IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 71-827 and 71-830

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,
Respondent.

TRANS WORLD AIRLINES, INC.,
Cross-Petitioner,

—v.—

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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Findings below, concurred in by every judge who has studied the record, untouched by this Court, establish that TWA was injured by defendants' conduct in an amount exceeding $45 million. The immediate money impact of the Court's decision denying TWA a remedy under the Clayton Act for these injuries is equivalent to an average loss of over $4,000 for each of TWA's more than 35,000 shareholders.

Yet the decision now announced reverses the unanimous courts below on an issue not even directly presented by defendants' latest petition for certiorari and not here briefed or argued: an issue originally considered by the Court in 1965 but not then thought worth acting upon. By substituting a broad *pre-emption* for the narrow antitrust *exemption* which the statute provides, a major change in the balance between antitrust policies and other regulatory standards has been effected—almost, it would seem, by inadvertence, and certainly with no opportunity for TWA to present arguments either of general policy or of special application to the facts of this case on the issue now announced to be dispositive.

The disposition of the case chosen by the majority, moreover, is to direct a summary dismissal without permitting any further proceedings. TWA is thus deprived of even the opportunity to prove (if the default is not to be regarded as establishing this surely pertinent fact) that the CAB orders of which judicial notice has been taken are ineffective to support the affirmative defense which this Court now upholds—ineffective because they were entered in proceedings in which critically important information had been knowingly withheld from the Board. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

We submit that a Court of ultimate review should not reach so startling and unexpected a result without giving TWA opportunity to present the reasons why that result does not do justice in this case. We think a question of due process is presented.

A. Pre-emption of the Antitrust Laws

This case has been decided by applying the doctrine of *pre-emption*—that is, that the grant to the CAB of the

power to authorize an acquisition of control under § 408 of the Federal Aviation Act had the effect of removing the entire subject matter of TWA's complaint from the jurisdiction of the antitrust laws. Mr. Justice Douglas explains the applicable rule of decision as follows:

> "In this context, the authority of the Board to grant the power to 'control' and to investigate and alter the manner in which that 'control' is exercised leads us to conclude that this phase of CAB jurisdiction, like the one in the *Pan American* case, pre-empts the antitrust field." (Slipsheet opinion, p. 21)

The defense which is expressly upheld at p. 3 of the slipsheet opinion is stated by the Court in these words:

> "Another defense of Toolco was that those transactions were under the control and surveillance of the Civil Aeronautics Board and by virtue of the Federal Aviation Act these transactions have immunity from the antitrust laws." (Slipsheet opinion, pp. 2-3)

Section 415, giving broad powers of *inquiry* to the CAB (Slipsheet opinion, p. 19 n. 12), is pointed to as a measure of the extent of the CAB's power to supervise and control and to preclude antitrust enforcement (Slipsheet opinion, p. 25; *infra,* p. 6).

Pre-emption, however, was not a question presented by the petition for certiorari, and it has not been briefed or argued (except incidentally in developing other points) since 1965 when it was the central issue before the Court in No. 443, October 1964 Term. The CAB commented on this fact in its 1972 Amicus Brief:

> "During the first round of appeals in this case, Toolco contended that the court was precluded from

granting any remedy for the conduct described in the TWA complaint because the Board had exclusive jurisdiction over the subject matter. No such contention has been included among the 'questions presented' in Toolco's current petition. Therefore, we assume that Toolco is no longer relying upon a 'supersession' theory and that it is unnecessary to repeat all of the Board's reasons for concluding that this case is not analogous to *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296. It appears to be conceded that the treble damage award in this case is within the jurisdiction of the courts." (at p. 15)[1]

Application of the doctrine of pre-emption to the facts of this case requires a very great departure from well established principles. When antitrust violations have occurred in areas where regulatory agencies have jurisdiction, the Court until this time has considered pre-emption or supersession a rule to be applied out of necessity, only

[1] The "fleeting comments" at oral argument referred to by Mr. Chief Justice Burger (Slipsheet dissenting opinion, p. 5) were addressed to the question of exemption: whether a specific immunity attached under § 414 because the actions complained of were "necessary" to enable defendants to do something approved by a specific § 408 order.

Defendants claimed that exemption was conferred by supposedly specific Board orders covering particular transactions, but the simple fact is that the only specific orders on particular transactions had nothing at all to do with anything TWA complained of with the single arguable exception of the exclusive day-to-day leases of certain Boeings. While the CAB may have mistaken the law, it knew what specific transactions were brought before it, and its comment as to the relationship of the damage items to the specific "modification orders" which it entered is authoritative:

> "Most of the specific items for which damages were awarded to TWA are unrelated to the various modification orders. • • • The delay in ordering Boeing jets, the interference with Convair deliveries, and the diversions of aircraft to other airlines are not remotely connected with the subject matter of any of the modification orders." (1972 Amicus Brief, p. 13)

when there is no other path to accommodation of the antitrust and regulatory regimes. *Silver* v. *New York Stock Exchange* calls this "the guiding principle to reconciliation of the two statutory schemes." 373 U.S. 341, 357 (1963). But where an express exemption from the antitrust laws has been specifically carved out by the statute, the statute itself has always been accepted as the authoritative definition of the boundary line. So this Court said through Mr. Chief Justice Hughes in *United States* v. *Borden Co.*, 308 U.S. 188, 201 (1939). So it said still, and still unanimously, through Mr. Chief Justice Warren in *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213, 217-18 (1966). The Court itself has accurately summarized this substantial line of cases in a sentence: "We could not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one." *California* v. *FPC*, 369 U.S. 482, 485 (1962).

The Court's decision in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), was not such a case, because it was not concerned with the effect of orders of the CAB which give rise to an exemption defined by statute—that is, orders under §§ 408, 409 and 412. In *Pan American* pre-emption was considered necessary because the subject matter—allocation of routes and territories—was at the heart of the CAB's regulatory role (as aircraft supply plainly is not) and had a kind of coherence which sporadic judicial intervention by injunctive relief would disrupt; no specific exemption was otherwise available to secure the CAB's performance of a role basic in the regulatory scheme. 371 U.S. at 305, 310.

Congress has spoken in favor of a specific and narrow exemption for the acquisition and exercise of control. It is granted in § 414—but only *"insofar as may be necessary"* to carry out the acts authorized by the § 408 order. If not

necessary, no exemption attaches. No more limiting language could have been selected by the legislative draftsmen. If this issue had been explored in argument before the Court, the question of what was "necessary" to carry out the Board's order would have been critical, and would have been reflected in the Court's decision. This point was not argued, and the Court's opinion has defined and applied an immunity plainly not limited to action "necessary" to carry out the order. Indeed, everything relating to a control relationship, "all transactions between parent and subsidiary—as originally conceived or subsequently exercised," has been pre-empted (Slipsheet opinion, p. 25). The transactions complained of, and held sanctioned through pre-emption, were not only between parent and subsidiary but affected others as well.

Thus it is not only the air carrier which is deprived of a remedy. It is all "those who can invoke the sanctions of the antitrust laws" (*ibid.*). The government itself is included in the ban. The baring of the public interest to threats normally protected against by the Sherman and Clayton Acts could not be more complete.

An examination of the factual situations and the actual agency involvement in previous cases before this Court can only reinforce the conclusion that the majority has departed from principles upon which the antitrust laws have previously been accommodated to regulatory schemes. To take one example, in *United States* v. *Radio Corporation of America,* 358 U.S. 334, 350-51 (1959), the Court refused to hold that the FCC's finding, in the exercise of its responsibilities under the statute, that the transaction at issue would serve the "public interest, convenience and necessity" had the effect of pre-empting the antitrust laws. Yet it was *stipulated* in *RCA* that the FCC had before it

and considered all of the facts which were present in the subsequently filed antitrust suit (358 U.S. at 338).[2]

The *Pan American* case (371 U.S. at 340-05 n. 9) left room for the doctrines of the *RCA* case and of *Maryland and Virginia Milk Producers Ass'n* v. *United States,* 362 U.S. 458, 468, 469-70, 472 (1960), but none is left by the present decision, in spite of the repetition in the majority opinion of the words from *Pan American* that "the Federal Aviation Act does not completely displace the antitrust laws" (Slipsheet opinion, p. 23). Indeed, the one "most conspicuous exception" cited by the opinion—a "combination or agreement between two air carriers involving trade restraints"—falls flatly within the provisions of §§ 412 and 414 and is one of the things that the CAB can most clearly exempt from antitrust attack.

We submit that the questions involved are of sufficient importance to justify full consideration, and we would welcome the opportunity to develop the policy considerations more fully. We believe that, upon further analysis of the relationship between pre-emption and statutory exemption, the Court will find the rationale of its decision unsatisfactory.

B. Antitrust Immunity Beyond the Regulated Field

The Court appears to have accepted defendants' characterizations of TWA's complaint—characterizations which

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[2] That the FCC is without an express statutory power to exempt conduct from the antitrust laws does not serve to reconcile the decisions, since the decision herein does not turn upon the statutory exemption expressly provided in the Federal Aviation Act, but upon the broad pre-emption of antitrust jurisdiction which was rejected in *RCA*.

do not give effect to the default as admitting the truth of the complaint's allegations.

The majority opinion says the "crux" of TWA's complaint was "the use by Toolco of its control over TWA to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing thereof" (Slipsheet opinion, p. 2). That view mistakes the events by which TWA's damages were measured for its charges of violation of law. Those charges establish the existence of a broad conspiracy that ultimately caused the damages.

What defendants did to TWA in the equipment and financing fields caused TWA loss (although no damages were awarded as to financing), but the violation of law charged by TWA involved a conspiracy to restrain and attempt to monopolize larger markets, of which TWA was but a part. Toolco's conduct with respect to TWA was an integral part of this broader course of conduct. This decision therefore now stands for the proposition that persons may admit by default, without fear of antitrust liability, that they have conspired to restrain and monopolize and have attempted to monopolize the sale of aircraft to air carriers, provided only that in furtherance of their scheme they have obtained control of an air carrier with CAB approval, whether or not the CAB was informed of their intentions. We do not believe that such a reach to the present decision could have been intended.

Even though surveillance by the CAB plainly did not extend to defendants' operations in the larger market, nor its inquiry reach the purposes which defendants had with respect to that market, the Court has nonetheless viewed TWA's allegations of antitrust violations as confined to defendants' domination of TWA itself. TWA, however, has no doubt of its ability to support the broader

charge if defendants' default had not deprived it of the opportunity to do so.[3]

It is pertinent in considering the relationship of these charges to the losses which TWA suffered that those losses were not the result of TWA's being compelled to purchase too many aircraft, or even the wrong aircraft, from defendants. That was the risk to the public interest foreseen by the CAB, against which its continuing surveillance was directed. What actually developed was the result of defendants' broader goals: their desire to penetrate the market of other carriers. TWA suffered from getting too few aircraft too late, the result of a conspiracy directed towards a broader market which the CAB did not have either authority or facilities to supervise.

In *Pan American* the anticompetitive actions complained of involved nothing beyond the defendants' alleged actions in controlling the route aspirations of the controlled carrier. Here it is alleged and admitted that the anticompetitive actions extended far beyond TWA. If pre-emption or exemption applies to anti-competitive conduct affecting markets of which the controlled carrier is only a part, the scope of the commerce to which the antitrust laws apply has been further and sharply narrowed. The rule is not one that can be confined to the Federal Aviation Act; other industries are subject to similar regulation.

On reconsideration, the Court could consider whether whatever pre-emption there is should extend to the broad trade restraints actually alleged in the complaint and admitted by the default.

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[3] Special Master Herbert Brownell reviews the allegations and emphasizes the existence of evidence to support the charges that defendants were engaging in anticompetitive conduct in a market much broader than the TWA market (Brownell Report, pp. 28-34; A-1966; *see also* the Court of Appeals opinion, 449 F.2d at 67-68, A-2767-70).

C. The Immunity Conferred Is Inconsistent with the CAB's Expressed Intent

To ascribe retroactively to past CAB orders an immunizing effect which the CAB did not know those orders would have and did not intend them to have is unnecessary, and we believe both inappropriate and unjust.

The Board's own position on the extent of its powers and the effect of the orders it entered has been explicit and consistent. The Board has said to this Court: we do not have the power to immunize Toolco's conduct here from the operation of the antitrust laws; we do not have the competence to exercise such a power; we did not intend to immunize such conduct when we entered the orders that are now said to have done so; when we entered the orders we were not told nor did we have knowledge of the anti-competitive purposes and restraints on trade that Toolco has conceded by its default in this case.[4]

The Court's decision in this case informs the Board that its powers were far greater than it knew, and its orders might have a far broader effect than it intended. A supervisory role is defined which the Board had not realized was part of its assignment. If these rulings stand, the Board will attempt in the future, because it must, to carry out these greater duties and use its powers with knowledge of the responsibilities that attach to their use.

But to give the same effect to past orders is to defeat the Board's real intent.[5] The consequences attributed to

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[4] There is annexed in the Appendix a selection of excerpts from and citations to the briefs *amicus* filed on behalf of the CAB on this and on the prior appeal in this case.

[5] In this respect the instant case is very different from *Pan American*. There the Court differed with the Board as to what its powers were, but the case was such that the Board, after that decision, could still exercise its powers to deal with the Grace-Pan

the actions of the Board are irretrievable and disastrous to TWA, yet they are the product of pure inadvertence. Surely the Board's *failure* during the 1950's to take additional action, in the exercise of this power only now revealed to it, does not support an extension of whatever license was granted to specific transactions never formally acted on by the Board at all (Slipsheet opinion, pp. 19-20).

Some passages in the majority's opinion suggest that it believes the Board at the time it acted intended to do more than it now says it did. A full examination of the record of the Board proceedings would clearly demonstrate the contrary. If the Board's present representations are not to be accepted as dispositive, TWA should be entitled—if not here, then before the lower court—to establish the facts. The partial selection of materials by defendants which is all that the Court has had available to it is no substitute for a more detailed review—and judicial notice is not appropriate as to a contested matter of this complexity.

This would appear at the very least an appropriate situation for the application of the principles of primary jurisdiction rather than pre-emption. A referral to the Board would make it possible for the Board to determine the matters the Court says are within its jurisdiction. This course, like that followed by this Court in *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213, 224 (1966), would permit a considered judgment by the Board as to whether or not it should approve the actions alleged in the complaint—a determination the Court now says the Board should have made, but which the Board expressly states it did not. Any other course allows a

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American-Panagra situation. That is not true here. Moreover, in *Pan American* no issue was presented as to what the Board had intended by its prior action.

monopolist to retain the fruits of his monopolistic conduct solely as a result of error on the part of the administrative agency, both as to its statutory authority and as to the factual context of the matters brought before it for decision.

D. TWA Should Have the Opportunity to Show That the CAB Was Misled

In any event, dismissal of the complaint is unwarranted if there are facts TWA could prove which would entitle it to relief despite the Court's holding that defendants' CAB defense is valid.

TWA has contended throughout this proceeding that the Board's orders—from which antitrust immunity is held to be derived—were entered in proceedings in which Toolco had knowingly withheld from the Board information of the utmost materiality. The Board itself has told this Court that it did not know that Toolco was trying to establish itself as a supplier of aircraft to air carriers, or that it intended to prevent TWA from dealing with others for aircraft, as part of this larger scheme.

Surely this Court did not mean to hold that where immunity from the antitrust laws is obtained by fraud an antitrust claimant is not entitled to prove that fraud. In *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), the Court held—unanimously—that an antitrust claimant challenging the validity of a patent monopoly was entitled to prove charges of fraud in obtaining the patent, if he could. A patent that had been granted in proceedings in which the patent office had been deceived would not protect the patentee from antitrust charges based on the exercise of the otherwise lawful monopoly. "Fairness requires," the Court said, "that on remand Walker have the opportunity [to prove its claims]." 382 U.S. at 178.

Issuance of a patent is plainly the intentional exercise of statutory power to immunize certain conduct—within the scope of the grant—from the application of the Sherman and Clayton Acts. The *Walker* rule should apply *a fortiori* when reliance is placed on an inferred antitrust immunity which the agency did not realize would occur, and has said it did not intend.[6]

To deprive TWA of all opportunity to prove such fraud as would vitiate that immunity is to deprive it of rights which our judicial system has guaranteed it.

Although it is now clear that this Court's 1965 dismissal of certiorari as improvidently granted did not establish the 1964 Court of Appeals decision on defendants' CAB affirmative defense as the law of this case, the fact of that dismissal coupled with defendants' decision not to tender in their latest petition the issue now held dispositive requires, as a matter of fair and proper judicial administration, that TWA be granted its day in court on that issue.

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[6] As this Court observed last term in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972), after citing *Walker*:

> "There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."

In *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286, 1295 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), the Court of Appeals applied the *Walker* rule in refusing to find that rulings of the Texas Railroad Commission pre-empted the antitrust laws (as these rulings otherwise would have under the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943)), because the rulings were obtained on the basis of false information filed by the defendant producers pursuant to a conspiracy to restrain trade and to monopolize. *See also Slick Airways, Inc.* v. *American Airlines, Inc.*, 107 F.Supp. 199, 213-14 (D.N.J. 1951), *app. dismissed*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953).

Alternatively, this Court should remand to the district court for further proceedings, or as appropriate for reference to the CAB, to determine what effect the CAB intended its orders to have and whether those orders were obtained by misrepresentations of defendants.

Respectfully submitted,

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CERTIFICATE

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

.....

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APPENDIX

Both when this case was before the Court during its 1964 Term and in the current Term the CAB stated in detail its own understanding of its powers under § 408, what it thought it was doing when it entered orders under that section, and what it did not intend to do, and what the scope of its actual inquiry into the TWA-Toolco relationship was.

As to the CAB's understanding of its powers:

> "Section 408 requires the Board to approve only an 'acquisition of control'; it does not give the Board continuing responsibility for supervision of a controlling person's management of an air carrier.
>
> • • •
>
> "Moreover, the Board has no jurisdiction over aircraft dealers or manufacturers as such, and it is not generally empowered to regulate the issuance of a carrier's securities or its capital structure, or to specify the aircraft which a carrier can acquire, the timing of such acquisitions, or any decisions to defer or refrain from aircraft acquisitions. Indeed, the Board is specifically precluded from interfering with a carrier's choice of equipment • • •.
>
> "Finally, the Board's remedial powers do not effectively cover the conduct alleged in the complaint." (1972 Amicus Brief, pp. 16-17; *cf.* the CAB's 1965 Amicus Brief in No. 443, October 1964 Term, pp. 12-13)

As to what the Board thought it was doing when its orders were entered:

> "The Board's [1944 and 1950] orders did confer antitrust immunity, but that immunity • • • did not ex-

tend to the manner in which control was thereafter exercised." (1972 Amicus Brief, p. 10; *cf.* 1965 Amicus Brief, p. 15)

Thus,

"* * * the Board's orders did not permit Toolco to utilize its power as a means of violating the antitrust laws." (1972 Amicus Brief, p. 10; *cf.* 1965 Amicus Brief, p. 15)

Assuming the truth of the allegations of TWA's complaint,

"* * * the specific acts which damaged TWA were not the normal and natural exercise of the control relationship approved by the Board, and consequently they were not given antitrust immunity." (1972 Amicus Brief, p. 11)

As to the subsequent modification orders,

"[t]he modification orders * * * did not purport to sanction anything other than the specific transactions involved." (1972 Amicus Brief, p. 12; *cf.* 1965 Amicus Brief, p. 16)

* * *

"Most of the specific items for which damages were awarded to TWA are unrelated to the various modification orders. * * * The delay in ordering Boeing jets, the interference with Convair deliveries, and the diversions of aircraft to other airlines are not remotely connected with the subject matter of any of the modification orders." (1972 Amicus Brief, p. 13)

As to the scope of the Board's inquiry,

"* * * the TWA charges * * * involve Toolco's use of its control over TWA to prevent TWA from

acquiring aircraft from other suppliers and from obtaining the financing necessary to acquire jets. * * * This restraint upon TWA's activities was, of course, neither submitted to nor approved by the Board, and it was certainly not necessary to carry out any of the Board's orders." (1972 Amicus Brief, pp. 12-13, *cf.* 1965 Amicus Brief, pp. 16-17)

* * *

"The sanctions [of the damage award] relate to subsequent actions, the antitrust aspects of which were never brought to the attention of or considered by the Board." (1972 Amicus Brief, p. 18)

The modification orders were entered:

"* * * upon application. * * * No hearings were held or adversary pleadings filed when such orders were entered." (1972 Amicus Brief, p. 4; *cf.* 1965 Amicus Brief, p. 4)

With respect to the extent of its surveillance, the Board's view is that:

"* * * the Act does not impose any duty on the Board affirmatively to monitor and supervise all aspects of the control relationship." (1972 Amicus Brief, p. 18; *cf.* 1965 Amicus Brief, pp. 11, 13)

Almost at the outset of the Board's involvement with Toolco's control over TWA, it was represented to the Board by Toolco's counsel, through a letter addressed to the Hearing Examiner in the first control proceeding, that "the approval sought by Hughes Tool Company in this case would not constitute a license to permit Hughes Tool

Company or TWA to do whatever they desire in the future * * *" (Doc. 178, Ex. B-7, Letter of January 24, 1944, reproduced in Transcript of Record, Nos. 443 and 501, October Term, 1964, Vol. V, at 610). The Board's contemporary view of what it was doing is set forth with complete clarity in the second control proceeding, in which it said, referring to its earlier control order, that "we did not intend to, and did not, grant a blanket, unlimited, *in futuro* approval of the relationship between Toolco and TWA" (9 C.A.B. 381, 389 (1948); A-3327).

As its two *amicus* briefs show, the Board has never changed its mind on this proposition.